

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-3621

Caption [use short title]

Motion for: dismissal for lack of appellate jurisdiction

Set forth below precise, complete statement of relief sought:

Defendant-appellee moves to dismiss this appeal for lack of jurisdiction because there is no final decision or other appealable order in the district court.

Flores v. United States Department of Justice

MOVING PARTY: United States Department of Justice

OPPOSING PARTY: Louis Flores

☐ Plaintiff

☒ Defendant

☐ Appellant/Petitioner

☒ Appellee/Respondent

MOVING ATTORNEY: Rebecca S. Tinio

OPPOSING ATTORNEY: Louis Flores, pro se

[name of attorney, with firm, address, phone number and e-mail]

United States Attorney's Office

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Jackson Heights, NY 11372

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louis.flores@progressqueens.com

Court- Judge/ Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☐ Yes

☒ No (explain): opposing party is pro se

Opposing counsel's position on motion:

☐ Unopposed

☐ Opposed

☒ Don't Know

Does opposing counsel intend to file a response:

☐ Yes

☐ No

☒ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below?

☐ Yes

☐ No

Has this relief been previously sought in this court?

☐ Yes

☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested?

☐ Yes

☒ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

☐ Yes

☒ No If yes, enter date:

Signature of Moving Attorney:

/s/ Rebecca S. Tinio

Date: 3/1/2018

Service by:

☒ CM/ECF

☒ Other

[Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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FLORES v. UNITED STATES
DEPARTMENT OF JUSTICE
-----X

No. 17-3621

**DEFENDANT-APPELLEE’S MEMORANDUM IN SUPPORT OF MOTION
TO DISMISS FOR LACK OF APPELLATE JURISDICTION**

Defendant-appellee the United States Department of Justice (“DOJ” or the “government”) respectfully submits this memorandum in support of its motion to dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27.1. This Court lacks jurisdiction over this interlocutory appeal because there has been no final decision of the district court, nor any other appealable order. Plaintiff-appellant Louis Flores, proceeding pro se, appeals the district court’s denial of his motion for disqualification of the district judge or reassignment to another judge, and the entry of a scheduling order for summary judgment briefing. Those actions have not resolved this matter or any part of it. For that reason, this Court lacks jurisdiction and should dismiss the appeal.

STATEMENT OF THE CASE

This litigation, which is still pending before the district court (John G. Koeltl, J.), arises from requests made by Flores under the Freedom of Information

Act, 5 U.S.C. § 552. (Dist. Ct. ECF No. 2). The parties are currently in the midst of summary judgment briefing before the district court; the government submitted its motion on January 31, 2018, and the submissions will not be complete until, at the earliest, April 25, 2018. (Dist. Ct. ECF Nos. 47-52).

On August 9, 2017, Flores filed a letter on the district court docket addressed to Chief Judge Colleen McMahon. (Dist. Ct. ECF No. 25). The letter asked Chief Judge McMahon to reassign the matter to a different district court judge, on the ground that Judge Koeltl supposedly made remarks during a court conference evidencing bias in favor of the government in this case. (Dist. Ct. ECF No. 25).

On October 4, 2017, Flores filed a second letter on the district court docket, addressed to both Chief Judge McMahon and Judge Koeltl. (Dist. Ct. ECF No. 27). This letter again expressed Flores's belief that Judge Koeltl was not impartial, and sought an adjournment of a scheduled court conference. Judge Koeltl granted Flores's request for an adjournment, and held a court conference on October 19, 2017. (Dist. Ct. ECF No. 28).

Following that conference, Judge Koeltl entered an order dated October 19, 2017, denying Flores's motion for disqualification or reassignment, and setting a schedule for summary judgment briefing. (Dist. Ct. ECF No. 30 (the "Scheduling

Order’’)). On October 30, 2017, Flores filed a notice of appeal from the Scheduling Order. (ECF No. 1). On January 29, 2018, Flores filed a brief with this Court, confirming that this appeal is taken from the Scheduling Order. (ECF No. 31 (“Br.”) 4). To date, the district court has entered no decision on the merits nor any other final order or judgment in the underlying litigation.

ARGUMENT

Flores’s Appeal Should Be Dismissed for Lack of Appellate Jurisdiction

Absent a certification under 28 U.S.C. § 1292(b), this Court generally has jurisdiction only over “final decisions of the district courts of the United States,” 28 U.S.C. § 1291; certain interlocutory decisions “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions,” *id.* § 1292(a)(1); or appealable collateral orders. Because the Scheduling Order was none of these, this Court lacks jurisdiction over this appeal.

A “final decision” for the purpose of § 1291 is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quotation marks omitted); *accord Henrietta D. v. Giuliani*, 246 F.3d 176, 180 (2d Cir. 2001). The Scheduling Order was not a final order that ended the litigation on the merits. *See Coopers & Lybrand*, 437 U.S. at 467. Indeed, the Scheduling Order simply set

deadlines for the parties' merits briefing, which will not be complete until, at the earliest, April 25, 2018. (Dist. Ct. ECF No. 47). There has been no appealable final decision on the merits in this case. Nor does the Scheduling Order fall within any of the narrow exceptions to the final-decision requirement. *See Huminski v. Rutland City Police Dep't*, 221 F.3d 357, 359-60 (2d Cir. 2000) (explaining "narrowly tailored exception" for appeals of injunctions (quotation marks omitted)); *Will v. Hallock*, 546 U.S. 345, 349 (2006) ("stringent" requirements for collateral-order exception).

The portion of the Scheduling Order denying Flores's motion for disqualification or reassignment also did not constitute a final decision or other appealable order. *See, e.g., United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991) ("ordinarily an order denying a motion to recuse is not appealable as a final judgment under section 1291, and does not fall within the narrow collateral-order exception," where such an order is issued before a judgment on the merits has been entered (citations omitted)); *Dubnoff v. Goldstein*, 385 F.2d 717, 721 (2d Cir. 1967) ("A determination of a District Judge not to disqualify himself is ordinarily reviewable only upon appeal from a final decision on the cause in which the application by affidavit was filed."); *Rosen v. Sugarman*,

357 F.2d 794, 796 (2d Cir. 1996) (joining “other courts of appeals in holding that an order denying an application for disqualification of a judge is not a final decision appealable under 28 U.S.C. § 1291”).

Because the Scheduling Order did not constitute a final decision or other type of appealable order, this appeal should be dismissed for lack of appellate jurisdiction.

Dated: March 1, 2018
New York, New York

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
Attorney for Defendant-Appellee

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LOUIS FLORES,	:
	:
Plaintiff-Appellant,	:
	:
-against-	:
	:
UNITED STATES DEPARTMENT OF JUSTICE,	:
	:
Defendant-Appellee.	:
	:
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I, Rebecca S. Tinio, an Assistant United States Attorney for the Southern District of New York, hereby certify that on March 1, 2018, I caused a copy of Defendant-Appellee's motion papers, filed on March 1, 2018, to be sent to:

- Louis Flores
34-21 77th Street
Apt. 406
Jackson Heights, NY 11372

Dated: New York, New York
March 1, 2018

GEOFFREY S. BERMAN
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